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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 882

BOSTON & PROVIDENCE RAILROAD DEVELOPMENT GROUP,
PETITIONER,
v.
CHARLES W. BARTLETT, TRUSTEE, et al.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI.

PETITION FOR REHEARING AND SUPPLEMENTAL PETITION UNDER 11 U.S.C. 208

ARMISTEAD B. ROOD
Room 735
53 State Street
Boston, Mass., 02109
(617) 482-5888
Attorney for Petitioner

JOSEPH B. HYMAN
1419 North Court House Road
Arlington, Va., 22001
~~(617) 724-1334~~
Of Counsel

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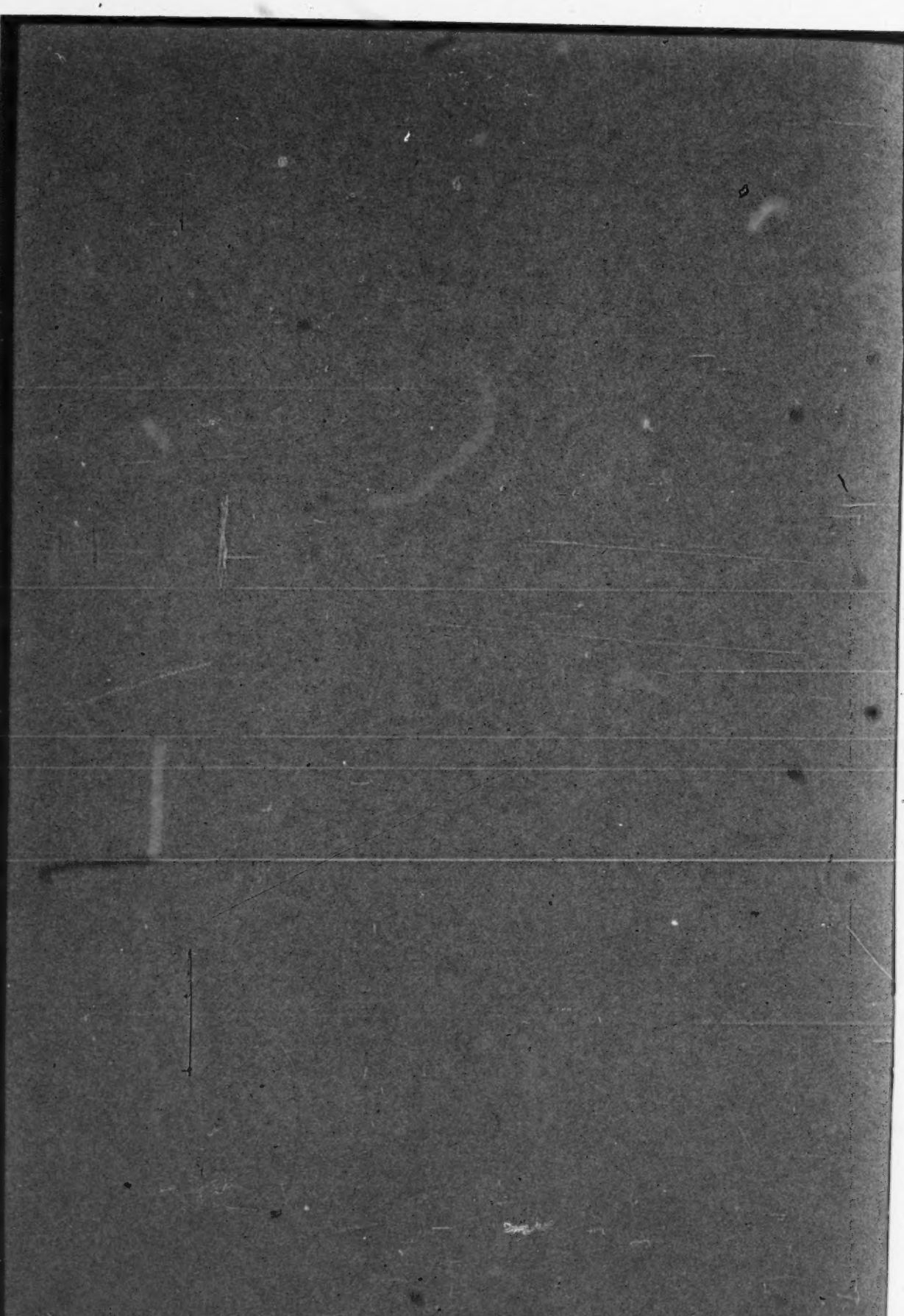

PETITION FOR REHEARING AND SUPPLEMENTAL PETITION UNDER 11 U.S.C. 208

Status of the Proceeding

This Court denied the petition for certiorari on March 16.

This Court has not acted on the two petitions requesting return of the B&P 1966 plan of reorganization to the I.C.C. for reexaminations in light of new "changes, facts, and developments", claiming the special relief provided by paragraph (2) of 11 U.S.C. Section 208(a).

The first Section 208 petition was filed by the Greater Boston Committee on the Transportation Crisis, with motion for leave to intervene in this B&P reorganization proceeding as a party on behalf of the intense local public interest. The Committee is an active Brandeis-type civic coalition. (See Mason: *Brandeis, A Free Man's Life*, index citations on the Public Franchise League.) It has standing to intervene. (See 7 Law & Contemporary Problems 495, *Protecting the User Interest in Railroad Reorganization*.)

The Boston & Providence Railroad Development Group filed the second Section 208 petition, by right. (The Development Group has been a party since 1954, standing as a fiduciary for the B&P stockholder class. Since 1963 it has been the only party of B&P security holders not committed to the old New Haven.

The Clerk's letter. In the absence of Court action on the Section 208 petitions by March 30, the Development Group's attorney wrote a letter of inquiry to the Clerk, who answered by letter of April 7 thus:

> "In reply to your letter of April 2, I wish to confirm the fact which I told you orally last week that the

Court considers its order of March 16 as disposing of the entire case before it and that you should not anticipate any separate actions on the motions [*i.e.*, the Section 208 petitions] that have been filed."

His explanation. The letter recorded the Clerk's oral statement of April 3. At that time Mr. Davis explained that the Court was aware of the Section 208 petitions (or motions) but had decided not to act on them explicitly, because (*a*) it was believed that such action would require the Court to make a necessary finding (*b*) which would require the Court to grant certiorari, whereas (*c*) the Court wished to avoid granting certiorari.

The Development Group's counsel are surprised by this view. They expected the Court to grant their Section 208 petition even if it should not grant certiorari.

Section 208 requires more than denial *sub silentio*

First impression. Apparently this is the first time that Section 208 relief has been claimed in this Court. The reason why Congress enacted Section 208 was to provide relief against the sort of judicial foreclosure that this Court administered to petitioner on March 16. It is not enough to brush off petitioner's right under Section 208 *sub silentio*. Petitioner is entitled to have its right passed on deliberately and formally.

The senior justices will remember that Section 77 was enacted hastily to deal with the railroad insolvencies of the Depression. Section 77 became effective on March 3, 1933. It reformed the procedures of equity reorganization. It drafted the I.C.C. to serve as an expert judicial arm by (1) "determining" prospective earning power, (2) capitalizing it into a new reduced valuation, and (3) designing

a new set of reorganization securities within the valuation limit.

The Commission conjured up its earning power forecasts out of the Marathon records compiled before it in the ruinous context of the Mid-Thirties. When the forfeiting junior security holders sought judicial protection, they found appellate relief blocked by the substantial evidence rule — and by judicial deference to the Commission, which was still our most distinguished administrative agency.

Nobody realized that Adolf Hitler and the Japanese would suddenly restore railroad earnings. From a peak of 1,252 millions in 1929 the net railway operating income of all U.S. Class I rail carriers sank to 326 millions in 1932 and was still only 373 millions in 1938. Yet it rose to 1,452 millions in 1942. *(Moody's Transportation Manual).* The Second World War ushered in a new era of high railroad prosperity.

The recovery of earnings made the Commission's forfeiture plans confiscatory. The Cotton Belt Route (St. Louis Southwestern) illustrates the procedural *rigor mortis* that led Congress to enact Section 208.

In 1939 Cotton Belt common stock accrued a deficit of $17.53 per share. In 1941, however, it earned $20.23. It earned $41.45 in 1944. And so on, $90.48 per share in 1954. *(Moody's).* And yet on March 10, 1947, this Court denied certiorari to review the Commission's Cotton Belt plan which wiped that stock out. 330 U.S. 836.

Fortunately the district court later was induced to dismiss that reorganization proceeding, because the debtor was able to rehabilitate itself. (And if this Court will grant the relief now herein sought, B&P can probably be rehabilitated too.)

The battles of the late Robert R. Young to save Missouri Pacific stock from similar judicial extinction are well known to this Court. (See Borkin: *Robert R. Young* (1969), pp.

134-136, 219.) That was finally accomplished by the relief of Section 208. See *Missouri Pacific R. Co. Bondholders Committee* v. *Thompson,* (1952) 194 F.2d 799, 802-803.

It is the essence of Section 208 relief that the Court before which the confirmation of the B&P plan is pending on review must stop the confirmation review proceeding in order to allow the *Commission* to pass upon the question of whether subsequent developments warrant changing the plan. It is *not* this Court that is expected to make that finding, but the expert Commission.

If, however, this Court shall brush the Section 208 petition aside, thereby it will also brush aside the statute itself. Petitioner does not believe that such is the Court's deliberate intent.

The passage of 18 months from September 16, 1968 strengthens petitioner's right under Section 208

The petitions already filed under Section 208 (a) invoked its paragraph (2) and asked this Court to find that changes, facts, or developments have occurred which make it expedient for the Commission to reexamine the B&P plan in order to insure that it will be fair and equitable and in the public interest if and when consummated. The Court should accordingly so return the plan.

Surely it cannot now be doubted that there have been "changes, facts, or developments" which make it at least expedient to reexamine. To say this does not entail the Court's making any finding on full plenary review of this case. It is simply a matter of summary judicial notice.

Now, however, since the petitions were filed, 18 months have elapsed since September 16, 1968. That was the date of the Commission's previous report refusing to reexamine the plan under paragraph (1) of Section 208. *Boston & Providence R. Corp. Reorganization,* 333 I.C.C. 713.

Paragraph (1) was not available when the petitions herein were filed. It provides another procedure for Section 208 relief. It requires the Commission to tell the Court (without any prompting from the Court) whether any new developments make it necessary or expedient to reexamine the plan. Paragraph (1) does not even require a rudimentary finding by the Court. However, paragraph (5) of Section 208 requires that petitions under paragraph (1) as well as paragraph (2) shall be transmitted via this Court before which the plan is pending, having been filed before confirmation shall become final.

> Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court. [Paragraph (5)]

See *Missouri Pacific* v. *Thompson, supra*, p. 803.

The new Providence & Worcester development

On April 7, 1970, the press reported that the Providence & Worcester Railroad enterprise has decided to reject merger into Penn Central, and to stand upon its feet as a carrier. This is a major new development. It follows P&W's current failure to win certiorari along with the New Haven bondholders (October Term 1969, No. 918). The Boston Herald article reports an interview with the P&W president, Robert H. Eder, concluding thus:

> If the Penn Central takes control, he added, "it is unlikely that the company's claims would be resolved in any manner favorable to this company or its minority stockholders."

Significance. The Commission has characteristically adhered to its old finding on the basis of its 1939 record that B&P has no earning power. Hence the Commission's primary method of valuation by capitalizing earning power failed and it resorted to a secondary test, based on what a willing buyer would pay. The New Haven was the only buyer in sight. It held B&P in its captive market and offered to pay piecemeal scrap value, believing that to be the constitutional minimum before the *Hudson Tubes* decision(referred to in the New Haven oral argument before this Court on March 30 as the PATH case). See petition for certiorari, p. 9.

P&W now looms as another connecting carrier which may well be in a position to join in one way or another with Boston & Providence. P&W's great decision has only just now been made, and there has not yet been time to resolve the possibilities for B&P. There should be time if the Section 208 petitions shall be transmitted to the Commission.

The two companies share a common great railroad way northward from Providence Union Station through Pawtucket and Central Falls for 6 miles to Boston Switch near the Massachusetts line, including vast obsolete yard lands awaiting urban conversions. This layout has elements reminiscent of both the Grand Central situation before New Haven's merger and of Oak Point and Harlem River yards. Providence of course is not New York, but it is New England's second metropolis. The P&W also offers a connection between B&P and the Boston & Maine.

Therefore petitioner says that another new development for the Commission to consider is the opportunity for B&P to effect a solution more favorable than the present plan of reorganization through an arrangement with the Providence & Worcester Company.

This is by no means incompatible with sale to the Com-

monwealth of Massachusetts, since it appears that the Commonwealth probably would not want B&P's properties in Rhode Island — and those are the properties with which the Providence & Worcester is involved.

Conclusion

It is emphasized that the petition for certiorari (p. 9) asks the Court simply to instruct the First Circuit to review the B&P plan. Petitioner is confident that one review would correct the plan — which is why the New Haven side has fought so hard to obstruct review.

In reviewing the plan the First Circuit would presumably pass on the effect of the *Hudson Tubes* decision on the liquidation value of a railroad which is *not* going to be liquidated, but which will be operated as an increasing public transportation facility. (The *Hudson Tubes* case came out *after* the first effort to get judicial review.)

Confusion over the old debentures persists. It has scared off one recent potential buyer of the B&P — which is why the New Haven side obstructs their adjudication. Again, all that petitioner asks from the Supreme Court is an order for the lower court to adjudicate the debentures. *This Court is not asked to go into their merits.* And so with the other questions presented in the certiorari petition.

Finally, if this Court is still unwilling to instruct the lower courts as requested -- in face of the clear demand for judicial housekeeping — then petitioner presses its Section 208 petition as follows.

Petitioner requests this Court to treat its Section 208 petition of February 28, 1970, supplemented by this petition of April 8, *first,* as a petition under paragraph (2) of 11 U.S.C. 208(a) and *second,* as a petition under paragraphs (1) and (5) thereof, for immediate referral to the Commission, with this proceeding over confirmation of the plan

meanwhile to be tolled pending receipt of the Commission's report.

Petitioner is concerned that its right to file a Section 208 petition apparently exists only so long as this proceeding to review confirmation of the plan remains pending in this Court.

Respectfully submitted,

ARMISTEAD B. ROOD
Attorney for Petitioner
Development Group

JOSEPH B. HYMAN
Of Counsel
April 8, 1970

I certify that this petition is presented in good faith and not for delay, and that it is restricted to grounds permitted by Rule 58(2).

ARMISTEAD B. ROOD